



UTILITY PATENT

AF:dw
B&D No. TN1698

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BOARD OF PATENT APPEALS AND INTERFERENCES

In re application of: **Peter CHAIKOWSKY**

Serial No.: **09/524,076**

Examiner: **B. Ashley**

Filed: **March 13, 2000**

Group Art Unit: **3724**

For: **MITER SAW**

Assistant Commissioner for Patents
Washington, DC 20231

APPEAL BRIEF

I, Adan Ayala, Reg. No. 38,373, certify that this correspondence is being deposited with the U.S. Postal Service as first class mail in an envelope addressed to the Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450 on Sept. 23, 2004



Adan Ayala

Dear Sir:

I. INTRODUCTION

A final Office Action was mailed on May 14, 2004. In response to such Office Action, a Notice of Appeal was mailed on July 23, 2004, for the above-identified application. The present appeal brief is being timely filed as required under 37 CFR § 41.37.

II. REAL PARTY IN INTEREST

The real party in interest in the present case is Black & Decker Inc. An assignment transferring all rights to the present application and resulting patents was filed in the priority application. The assignment can be found at Reel 010139, Frame 0027.

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III. RELATED APPEALS AND INTERFERENCES

No other appeals or interferences related to the present case are currently pending.

IV. STATUS OF CLAIMS

Claims 1-11 are currently pending in the present application.

Claims 1-11 are rejected and are presently appealed.

V. STATUS OF AMENDMENTS

No amendments have been filed subsequent to final rejection.

VI. SUMMARY OF CLAIMED SUBJECT MATTER

Pursuant to 37 CFR § 41.37 and MPEP § 1206, Applicant/appellant hereby provides a concise explanation of the inventions defined in the claims involved in the present appeal. This explanation refer to the specification by page and line number and to the drawings, as required by the CFR and the MPEP rules. However, the following explanation only refers to the embodiments disclosed in the specification and does not discuss alternative mechanisms that would be covered by the claims. Accordingly, the following explanation should not be used to limit the scope of the claims.

Independent Claim 4 calls for a miter saw 10 comprising a base assembly 11 (spec., p. 3, lns. 5-6) and a fence 20 attached to the base assembly 11 for supporting a workpiece (spec., p. 3, ln. 24 to p. 4, ln. 3). The fence 20 has a fence plane 20P. FIG. 4 and spec., p. 5, ln. 15. The miter saw 10 also has a rotatable table 12 rotatably connected to the base assembly 11. Spec., p. 3, lns.

6-7. The table 12 has a table plane 11P for supporting the workpiece. FIG. 4 and spec., p. 4, lns. 8-9.

The miter saw 11 also has a saw assembly 30 including a motor 17 and a blade 14 driven by the motor 17. Spec., p. 3, lns. 9-10. The blade 14 having a radius R (FIG. 4 and spec., p. 4, ln. 10) and a blade center BC (FIG. 4 and spec., p. 4, lns. 15-16).

In addition, the miter saw 11 has a pivot arm 8 pivotally attached to the table 12 and pivotally supporting the saw assembly 30 about a first axis A substantially parallel to the table plane 11P, allowing a user to plunge the blade 14 below the table plane 11P. Spec., p. 4, lns. 10-13.

With such arrangement, the distance ABP between the first axis A and the table plane 11P is about 0.472 times the radius R. Spec., p. 4, lns. 8-10. In addition, the distance AFP between the first axis A and the fence plane 20P is about 1.45 times the radius R. Spec., p. 4, lns. 11-13. Also, the distance ABC between the first axis A and the blade center BC is about 1.882 times the radius R. Spec., p. 4, lns. 15-16.

Claims 1-3 and 5-11 are ultimately dependent upon Claim 4.

VII. GROUNDS OF REJECTION TO BE REVIEWED ON APPEAL

- A. Whether Claims 1-11 are unpatentable under 35 USC § 103(a) over DE 197 06 408 (“DE ‘408”).
- B. Whether Claims 1-2 and 4-6 are unpatentable under 35 USC § 103(a) over US Patent No. 5,063,802 (“Shiotani”) in view of DE ‘408.

VIII. ARGUMENT**A. Claims 1-11 are Patentable under 35 USC § 103(a) Over DE '408.**

The Board should reverse the Examiner's improper final rejection of Claims 1-11 under 35 USC § 103(a) based on DE '408. In particular, the Examiner erred by disregarding evidence of criticality and nonobviousness. Therefore, the Examiner's rejection was improper and should be reversed.

For the benefit of the Board, Applicant/Appellant hereby attaches a translation of DE '408 as Appendix B, which was previously submitted in the present case. Admittedly, DE '408 shows a miter saw comprising a base assembly, a rotatable table rotatably connected to the base assembly, the table having a table plane, a fence connected to the base assembly and having a fence plane, a saw assembly including a motor and a blade driven by the motor, the blade having a radius and a blade center, and a pivot arm pivotally attached to the table and pivotally supporting the saw assembly about a first axis substantially parallel to the table plane, allowing a user to plunge the blade below the table plane. However, based on Figure 3 of DE '408, the distance between the first axis and the table plane is 0.57 times the radius and the distance between the first axis and the fence plane is 0.927 times the radius.

By contradistinction, Claim 4 calls for the "distance between the first axis and the table plane is about 0.472 times the radius, distance between the first axis and the fence plane is about 1.45 times the radius."

The Examiner argues that it would be obvious to modify DE '408 to obtain such specific dimensions. Admittedly, differences in ranges will not support the patentability of the claimed subject matter unless there is evidence that such range is critical. In fact, the "law is replete with

cases in which the difference between the claimed invention and the prior art is some range or other variable within the claims In such a situation, the applicant must show that the particular range is critical generally by showing that the claimed range achieves unexpected results relative to the prior art range." *In re Woodruff*, 919 F.2d 1575, 16 USPQ2d 1934, 1936 (Fed. Cir. 1990).

Evidence of unexpected results (and thus of nonobviousness) includes evidence of superiority of a property shared with the prior art. *In re Chupp*, 816 F.2d 643, 2 USPQ2d 1437, 1439 (Fed. Cir. 1987). Similarly, evidence of a property not possessed by the prior art is evidence of nonobviousness. *In re Papesch* 315 F.2d 381, 137 USPQ 43, 48 (CCPA 1963).

In the present case, having an arrangement with the claimed dimensions is critical because a miter saw with such dimensions can cut certain desired workpieces with a smaller blade that were not previously achievable. As evidenced by the declaration of Peter Chaikowsky (previously submitted in the present case and attached hereto as Appendix C),¹ a ten-inch miter

¹ The declaration of Mr. Chaikowsky should be accepted and considered by the Board as highly relevant and unimpeached by the Examiner. During his review, the Examiner improperly rejected the statements in the declaration without cause, and failed to provide any legal rationale for rejecting the declaration. The Examiner detailed several reasons for rejecting the statement in the declaration.

First, the Examiner relied on the rationale of "the last advisory action" to reject Mr. Chaikowsky's declaration. Searching through the file, the only Advisory Action found was mailed on October 7, 2003, where the Examiner stated that "the affidavit fails to provide a nexus with the current claims. The affidavit is directed to the changes in the after final amendment filed 9/5/03." In other words, the Examiner did not consider the affidavit because it did not relate to the claims pending at the time, but to the amended claims filed in an amendment after final which was not entered by the Examiner. However, those amended claims are closer to the presently-pending claims. Therefore, the Examiner should have reviewed the declaration in view of the present claims.

Second, the Examiner rejected the statements in the declaration because "the declaration is from the current inventor, which implies that he has never seen instant claims in any products." Admittedly, the declaration is from the inventor. However, Applicant/Appellant is unsure as to

saw according to the present invention can cut both a 6.5" by $\frac{3}{4}$ " workpiece and a dimensional 4" by 4" workpiece without requiring changing the position of the fence plane.

By comparison, DE '408 discloses a ten-inch miter saw that, while it certainly can cut a 6.5" by $\frac{3}{4}$ " workpiece as shown in Figure 5. To cut a 4" by 4" workpiece, however, the user needs to change the position of the fence plane. Such step is not necessary in the ten-inch miter saw according to Claim 4.

why such fact "implies that [the inventor] has never seen instant claims in any products." As declared by the inventor, he reviewed Claim 4. Appendix C, para. 9.

Third, the statements of the declaration were rejected because "the declaration attempts to attach criticality to the claimed invention" by relying on the declaration of "the instant inventor not a third party, that is a disinterested person." In other words, without any proof of bias or inaccuracy, the Examiner has discounted the declaration of a person making statements under penalty or perjury just because he is the inventor. Such rejection is improper because "secondary considerations" evidence, such as criticality, "give light to circumstances surrounding the origin of the subject matter sought to be patented." MPEP § 716.01(a), at 700-255 (8th ed., rev. 2, May 2004). Applicant/Appellant submit that Mr. Chaikowsky is a person with first-hand knowledge as to the circumstances surrounding the origin of the subject matter sought to be patented. His declaration is thus highly relevant to the issue of criticality and nonobviousness, especially where the Examiner has provided no evidence impeaching Mr. Chaikowsky's declaration or legal precedent allowing him to disregard an inventor's declaration solely based on his status as an inventor.

Finally, the Examiner noted that "the declaration of Chaikowsky is moot because there are no unexpected results." In other words, the Examiner considered all the facts concerning criticality, except for Mr. Chaikowsky's declaration, made a determination, then ruled that the declaration was moot in view of the determination. Such analysis violates the rule that "evidence traversing rejections ... must be considered the examiner whenever present." MPEP § 716.01, at 700-255. Applicant/Appellant submits that by finding the declaration "moot," i.e., deprived of practical significance (according to Webster's), the Examiner did not properly consider Mr. Chaikowsky's declaration.

Because the Examiner improperly rejected the statements in Mr. Chaikowsky's declaration, Applicant/Appellant urges the Board to properly consider the declaration as evidence of the criticality of the claimed invention.

The ability to cut the certain desired workpieces described above without moving the position of the fence plane forwardly or rearwardly to accommodate a different-sized workpiece is a property not possessed by the miter saw of DE '408. Furthermore, the ability to cut a dimensional 4" by 6" workpiece with a ten-inch blade is a property superior to the prior art. Under the Federal Circuit precedent, these facts are evidence of criticality and nonobviousness over DE '408.

While recognizing the "intent" of the claimed invention, the Examiner has placed little weight on the criticality of the claimed ranges because "the limitation of a fixed fence and specific sized boards are not recited in the claims." Such rationale ignores the fact that Claim 4 calls for a specific arrangement dictated by the claimed ranges. The ten-inch miter saw discussed above is an example of a miter saw built according to the claim, which would achieve the results not achieved with prior art miter saws.

Applicant/Appellant submits that, even though Claim 4 does not call for specific sized workpieces, the ranges claimed therein achieve a result not achieved with prior art miter saws. Therefore, the claimed ranges are critical. Because of such criticality, Claim 4 is patentable over DE '408.

The Examiner then relies on a mistaken interpretation of DE '408 to reject Claim 4. In particular, the Examiner notes that "DE '408 discloses two embodiments, one with a fixed fence, as shown in Figures 3 and 4, and... [such] first embodiment is capable of cutting two different sized boards, one 4x4 and the other 6x2.5, with the fence in the same position." This is incorrect. Referring to the translation of DE '408, the workpiece W1 cut in FIG. 3 has "a cross section of about 100 mm [~3.94 inches] in width (B1) and about 90 mm [~3.54 inches] in thickness (D1)." Appendix B, p. 6, lns. 32-34. In turn, the workpiece W2 cut in FIG. 4 has a width of "about 140

mm [~5.51 inches] and the thickness [of] about 60 mm [~2.36 inches].” Appendix B, p. 6, lns. 38-39.

Therefore, DE ‘408 does not disclose a miter saw that cuts two workpieces, “one 4x4 and the other 6x2.5,” as claimed by the Examiner. Even assuming for the sake of argument that a miter saw built according to DE ‘408 cuts the workpieces suggested by the Examiner, such miter saw would still not be able to cut a dimensional 6” by 4” workpiece obtained with a miter saw built according to Claim 4, having the same blade size. Accordingly, DE ‘408 does not disclose, teach or suggest a miter saw having all the limitations of Claim 4.

Finally, the Examiner discounts all the evidence of criticality and nonobviousness because the Examiner in this case “believes that this is a clear case of an applicant picking optimum dimensions to achieve a desired result where the result sought and the general dimensions to achieve the results are known.” Applicant/Appellant submits that, under the law, the Examiner must present evidence, not just plain belief or hunches, to support his allegations, especially in view of the evidence submitted by Applicant/Appellant.

In view of the evidence of criticality and the present state of the law, Applicant/Appellant urges the Board to reverse the Examiner’s improper rejection of the claims under DE ‘408 and to allow such claims.

B. Claims 1-2 and 4-6 are Patentable under 35 USC § 103(a) Over Shiotani in view of DE ‘408.

The Board should reverse the Examiner’s improper final rejection of Claims 1-2 and 4-6 under 35 USC § 103(a) based on DE ‘408. In particular, the Examiner erred by disregarding

evidence of criticality and nonobviousness. Therefore, the Examiner's rejection was improper and should be reversed.

Admittedly, Shiotani shows a miter saw comprising a base assembly, a rotatable table rotatably connected to the base assembly, the table having a table plane, a fence connected to the base assembly and having a fence plane, a saw assembly including a motor and a blade driven by the motor, the blade having a radius and a blade center, and a pivot arm pivotally attached to the table and pivotally supporting the saw assembly about a first axis substantially parallel to the table plane, allowing a user to plunge the blade below the table plane.

The Examiner has admitted that Shiotani does not disclose the claimed distances between the first axis and the table plane and between the first axis and the fence plane. To make up for such deficiency, the Examiner relies on DE '408, which shows the distance between the first axis and the table plane is 0.57 times the radius and the distance between the first axis and the fence plane is 0.927 times the radius.

By contradistinction, Claim 4 calls for the "distance between the first axis and the table plane is about 0.472 times the radius, distance between the first axis and the fence plane is about 1.45 times the radius." Even if Shiotani and DE '408 were to be combined, such combination does not have all the claimed elements.

The Examiner argues that it would be obvious to modify DE '408 to obtain such specific dimensions. As discussed in Section VIII.A above, there is no teaching or suggestion to modify DE '408 as proposed by the Examiner. Furthermore, Applicant/Appellant has presented evidence of criticality and thus of nonobviousness, which the Examiner has disregarded without any proper basis and not countered with any facts or evidence.

Accordingly, a miter saw based on Shiotani and the non-modified DE '408 would not have all the claimed elements. Therefore, Claim 4 is patentable over Shiotani/DE '408. Accordingly, Applicant/Appellant urges the Board to reverse the Examiner's improper rejection of the claims under Shiotani/DE '408 and to allow such claims.

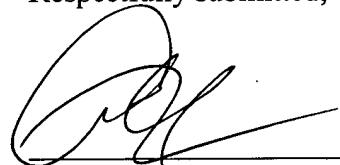
IX. APPENDICES

Applicant/Appellant has attached three appendices. In particular, Appendix A contains a copy of the claims involved in the appeal. In addition, Appendix B is the English translation of DE '408, which was previously presented in the Amendment mailed on July 2, 2001. Finally, Appendix C is the declaration of Peter Chaikowsky, which was previously presented in the Amendment After Final mailed on September 5, 2003.

X. CONCLUSION

Based on the foregoing, Applicant/appellant urges the Board to rule that Claims 1-11 are patentable over DE '408 and Shiotani/DE '408.

Respectfully submitted,



Adan Ayala
PTO Reg. No. 38,373
Attorney for Applicant/appellant

Appendices attached

UTILITY PATENT

B&D No. TN1698



IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

BOARD OF PATENT APPEALS AND INTERFERENCES

In re application of: **Peter CHAIKOWSKY**

Serial No.: **09/524,076**

Examiner: **B. Ashley**

Filed: **March 13, 2000**

Group Art Unit: **3724**

For: **MITER SAW**

Assistant Commissioner for Patents
Washington, DC 20231

APPEAL BRIEF

I, Adan Ayala, Reg. No. 38,373, certify that this correspondence is being deposited with the U.S. Postal Service as first class mail in an envelope addressed to the Commissioner for Patents, P.O. Box 1450 Alexandria, VA 22313-1450 on Sept. 23, 2004



Adan Ayala



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**TRANSMITTAL
FORM***(to be used for all correspondence after initial filing)*

		Application Number	09/524,076
		Filing Date	March 13, 2000
		First Named Inventor	Peter Chaikowsky
		Art Unit	3724
		Examiner Name	B. Ashley
Total Number of Pages in This Submission	33	Attorney Docket Number	TN-1698

ENCLOSURES (check all that apply)

<input checked="" type="checkbox"/> Fee Transmittal Form <input type="checkbox"/> Fee Attached <input type="checkbox"/> Amendment / Reply <input type="checkbox"/> After Final <input type="checkbox"/> Affidavits/declaration(s) <input type="checkbox"/> Extension of Time Request <input type="checkbox"/> Express Abandonment Request <input type="checkbox"/> Information Disclosure Statement <input type="checkbox"/> Certified Copy of Priority Document(s) <input type="checkbox"/> Response to Missing Parts/ Incomplete Application <input type="checkbox"/> Response to Missing Parts under 37 CFR 1.52 or 1.53	<input type="checkbox"/> Drawing(s) <input type="checkbox"/> Licensing-related Papers <input type="checkbox"/> Petition <input type="checkbox"/> Petition to Convert to a Provisional Application <input type="checkbox"/> Power of Attorney, Revocation Change of Correspondence Address <input type="checkbox"/> Terminal Disclaimer <input type="checkbox"/> Request for Refund <input type="checkbox"/> CD, Number of CD(s) _____	<input type="checkbox"/> After Allowance Communication to Group <input checked="" type="checkbox"/> Appeal Communication to Board of Appeals and Interferences <input type="checkbox"/> Appeal Communication to Group (Appeal Notice, Brief, Reply Brief) <input type="checkbox"/> Proprietary Information <input type="checkbox"/> Status Letter <input checked="" type="checkbox"/> Other Enclosure(s) (please identify below): Return Post Card
		Remarks

SIGNATURE OF APPLICANT, ATTORNEY, OR AGENT

Firm or Individual name	Adan Ayala, Esq.	
Signature		
Date	September 23, 2004	

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Typed or printed name	Adan Ayala, Esq.	
Signature		Date
	September 23, 2004	

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O I P E S U C A
PA T E N T & T R A D E M A R K C O M M I S S I O N

FEE TRANSMITTAL for FY 2004

Effective 10/01/2003. Patent fees are subject to annual revision.

 Applicant claims small entity status. See 37 CFR 1.27**TOTAL AMOUNT OF PAYMENT**(\$)
330

Complete if Known	
Application Number	09/524,076
Filing Date	March 13, 2000
First Named Inventor	Peter Chaikowsky
Examiner Name	B. Ashley
Art Unit	3724
Attorney Docket No.	TN-1698

METHOD OF PAYMENT (check all that apply)
 Check Credit card Money Other None
Order
 Deposit Account:Deposit
Account
Number

02-2548

Deposit
Account
Name

Black & Decker (U.S.) Inc.

The Director is authorized to: (check all that apply)

-
- Charge fee(s) indicated below
-
- Credit any overpayments
-
-
- Charge any additional fee(s) during the pendency of this application
-
-
- Charge fee(s) indicated below, except for the filing fee
-
- to the above-identified deposit account.

FEE CALCULATION**1. BASIC FILING FEE****Large Entity** **Small Entity**

Fee Code	Fee (\$)	Fee Code	Fee (\$)	Fee Description	Fee Paid
1001	770	2001	385	Utility filing fee	
1002	340	2002	170	Design filing fee	
1003	530	2003	265	Plant filing fee	
1004	770	2004	385	Reissue filing fee	
1005	160	2005	80	Provisional filing fee	

SUBTOTAL (1)(\$)
0**2. EXTRA CLAIM FEES FOR UTILITY AND REISSUE**

Total Claims	Extra Claims	Fee from below	Fee Paid
	-20 **	= 0	X _____ = 0
Independent Claims	-3 **	= 0	X _____ = 0
Multiple Dependent		X _____	= 0

Large Entity **Small Entity**

Fee Code	Fee (\$)	Fee Code	Fee (\$)	Fee Description
1202	18	2202	9	Claims in excess of 20
1201	86	2201	43	Independent claims in excess of 3
1203	290	2203	145	Multiple dependent claim, if not paid
1204	86	2204	43	** Reissue independent claims over original patent
1205	18	2205	9	** Reissue claims in excess of 20 and over original patent

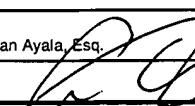
SUBTOTAL (2)(\$)
0**FEE CALCULATION (continued)****3. ADDITIONAL FEES**

Large Entity	Small Entity	Fee Description	Fee Paid
Fee Code	Fee (\$)	Fee Code (\$)	
1051	130	2051	65
1052	50	2052	25
1053	130	1053	130
1812	2,520	1812	2,520
1804	920*	1804	920*
1805	1,840*	1805	1,840*
1251	110	2251	55
1252	420	2252	210
1253	950	2253	475
1254	1,480	2254	740
1255	2,010	2255	1,005
1401	330	2401	165
1402	330	2402	165
1403	290	2403	145
1451	1,510	1451	1,510
1452	110	2452	55
1453	1,330	2453	665
1501	1,330	2501	665
1502	480	2502	240
1503	640	2503	320
1460	130	1460	130
1807	50	1807	50
1806	180	1806	180
8021	40	8021	40
1809	770	2809	385
1810	770	2810	385
1801	770	2801	385
1802	900	1802	900
Other fee (specify) _____			

*Reduced by Basic Filing Fee Paid

SUBTOTAL (3)(\$)
330

** or number previously paid, if greater; For Reissues, see above

SUBMITTED BY		Complete (if applicable)		
Name (Print/Type)	Adan Ayala, Esq.	Registration No. (Attorney/Agent)	38,373	Telephone 410-716-2368
Signature			Date	September 23, 2004

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